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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1223

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CHARLES E. THOMAS,
Assistant Counsel;
SAMUEL GRAFF MILLER,
Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Nature of the rates upon which reparations were ordered and the extent of reparations	1
The Supreme Court of Pennsylvania in determining the period for which the appellant was liable for reparations applied the principles established by the Supreme Court of the United States in *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 284 U. S. 370 (1932)	3
The Pennsylvania Supreme Court's interpretation of Section 313(a) of the Public Utility Law to be procedural is not a violation of the Fourteenth Amendment to the Constitution of the United States and presents no Federal question	8
Motion to dismiss or affirm	13

Table of Cases Cited

Cheltenham and Abington Sewerage Company v. *Pa. P.U.C.*, 122 Pa. Super. 252, 186 A. 149	2
Cheltenham and Abington Sewerage Company v. *Pa. P.U.C.*, 344 Pa. 366, 25 A. 2d 334	3, 5
Cheltenham and Abington Sewerage Company v. *Pa. P.U.C.*, 317 U. S. 588, 63 Sup. Ct. 38	3
Cheltenham and Abington Sewerage Company v. *Pa. P.U.C.*, 159 Pa. Super. 59, 46 A. 2d 583	3, 9, 10
Cheltenham and Abington Sewerage Company v. *Pa. P.U.C.*, 355 Pa. 377, 49 A. 2d 707	3
Arizona Grocery Co. v. *Atchison, Topeka and Santa Fe Railway Co.*, 284 U. S. 370, 52 Sup. Ct. 183	3, 4
Interstate Commerce Commission v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 944	11

Page

Manning, et al. v. *Newville Water Company*, 111 Pa. Super. 229, 169 A. 254 11
Herbert, et al. v. *Louisiana*, 272 U. S. 312, 47 Sup. Ct. 103 12

STATUTES CITED

Act of July 26, 1913 of the Pennsylvania Legislature, Article V, Section 3, P. L. 1374, 66 Purdons Penna. Stat. Sections 491-494 8
Act of July 26, 1913 of the Pennsylvania Legislature, Article V, Section 5, P. L. 1374, 66 P. S. Section 511 . 5
Act of May 28, 1937 of the Pennsylvania Legislature, Article III, Section 313(a), P. L. 1053, 66 P. S. Section 1153(a) 9

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STATEMENT OPPOSING JURISDICTION

Appellee respectfully submits that the questions presented by the appellant's jurisdictional statement have been settled adversely to appellant's position by decisions of this court; and in any event, the questions do not raise a substantial Federal question.

I

Nature of the Rates upon Which Reparations Were Ordered and the Extent of Reparations

The Public Service Commission of Pennsylvania on October 6, 1930 (10 Pa. P. S. C. 502) issued an order whereby it directed that the rates of Cheltenham and Abington Sewerage Company (appellant herein) be reduced to provide an allowable gross annual revenue of $36,140. The

company thereupon filed a tariff designed to yield the gross annual revenue permitted under this order and the tariff became effective July 1, 1931. The company continued to collect rates under this tariff until January 1, 1937.

On December 11, 1934, the Public Service Commission instituted a proceeding to determine the fairness, reasonableness, and justness of this commission-made rate. As a result of this new investigation, the Commission issued an order on August 30, 1935 as to future rates fixing the annual allowable revenue at a maximum of $27,700. (14 Pa. P. S. C. 76). The company did not follow the Commission order, but appealed to the Superior Court of Pennsylvania, which modified the findings of the Commission, and permitted an allowable gross annual revenue of $30,050. *Cheltenham and Abington Sewerage Co.* v. *P. S. C.*, 122 Pa. Super. 252, 186 A. 149 (1938). The Supreme Court of Pennsylvania refused to allow an appeal, and the order of the Superior Court became final on September 17, 1936. The Commission then issued a new report and order on November 30, 1936 (16 Pa. P. S. C. 118), directing a new tariff to be filed effective January 1, 1937 in accord with its previous order as modified by the Superior Court. In compliance therewith, the appellant filed a new tariff which became effective January 1, 1937.

The reparations, as finally ordered by the Supreme Court of Pennsylvania, are for the period August 30, 1935 to January 1, 1937, and resulted from a complaint filed with the Commission on October 17, 1935, subsequent to the Commission order of August 30, 1935, which found that appellant's rates were unreasonable and directed that a new tariff be filed.

It is to be noted that in this case there are two commission-made rates, the first being established by an order of October 6, 1930, and the second by an order of August 30, 1935. The second rate so fixed was lower than the first.

The reparations in issue were ordered by the Supreme Court of Pennsylvania in *Cheltenham and Abington Sewerage Co.* v. *Pa. P. U. C.*, 344 Pa. 366, 25 A. 2d 334 (1942), on the basis of the Commission action of August 30, 1935, the court holding that the Commission's action was tantamount to an act of the Legislature which the appellant was bound to follow and which in substance repealed the first commission-made rate.

At this stage of the proceeding the Supreme Court of the United States allowed an appeal by the Company, but the appeal was dismissed on October 12, 1942, 317 U. S. 588, 63 Sup. Ct. 38, 87 L. Ed. 482, for want of a final judgment.

The next phase of this case involved the amount of reparations to be paid and the patrons of the company entitled thereto. The Superior Court of Pennsylvania, in *Cheltenham and Abington Sewerage Company* v. *Pennsylvania Public Utility Commission*, 159 Pa. Super. 59, 46 A. 2d 583 (1946), affirmed the final order of the Commission of October 1, 1945 awarding reparations to all patrons in specific amounts. On appeal the Supreme Court of Pennsylvania affirmed the decision of the Superior Court in a *per curiam* opinion. 355 Pa. 377, 49 A. 2d 707 (1946).

II

The Supreme Court of Pennsylvania in Determining the Period for Which the Appellant Was Liable for Reparations Applied the Principles Established by the Supreme Court of the United States in Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co., 284 U. S. 370 (1932).

The leading applicable decision of the Supreme Court of the United States involving reparations upon commission-made rates is that in *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 284 U. S. 370, 52 Sup. Ct.

183 (1932). That case dealt with reparations on shipments which moved under rates approved or prescribed by the Interstate Commerce Commission as reasonable. The several quotations from the case which follow establish the law of reparations based upon commission-made rates:

One page 383 of 284 U. S. this court said:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. Interstate Commerce Commission *v.* Baltimore and Ohio R. Co., 145 U. S. 263, 275. * * *"

On page 384:

> "* * * Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. * * *"
>
> "The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. * * *"

On page 386:

> "* * * When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.* * *"

On page 388:

> "* * * This is true because the Commission in naming the rate, speaks in its quasi-legislative capacity. * * *"
>
> "* * * By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the services to be performed by the carriers. * * *"

And on page 389:

> "As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a unlawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. * * *."
>
> "* * * It [Interstate Commerce Commission] could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

This court was, of course, speaking of the Interstate Commerce Act, when it referred to legislation; but that Act is *ejusdem generis* with the Pennsylvania Public Utility Law, and its prototype, the Pennsylvania Public Service Company Law. Article V, Section 3, of The Public Service Company Law, the Act of July 26, 1913, P. L. 1374, 66 Purdon's Pa. Stat. Ann. Sections 491-494 (repealed by the Public Utility Law, the Act of May 28, 1937, P. L. 1053, Section 1502, 66 P. S. Section 1562) reads in parts as follows:

> "Whenever the commission shall determine, after hearing, had upon its own motion, or upon complaint, that the rate, fares, tolls or charges established * * * by any public service company * * * are unjust or unreasonable * * *—then the commission shall determine, and prescribe by a specific order, the maximum, just, due equal, and reasonable rates * * * to be thereafter established * * * or collected for the service to be performed; * * *."

The Supreme Court of Pennsylvania, in its decision in the first stage of this proceeding, *Cheltenham and Abington Sewerage Co.* vs. *P. U. C.*, 344 Pa. 366, 25 A. 2d 334 (1942), determined that reparations were payable and in so doing followed the principles quoted, supra, from the Arizona

Grocery Company case. This is apparent from the following language from the Pennsylvania Supreme Court opinion:

On page 369 of 344 Pa. the court said:

> "Mr. Justice Roberts in the leading case on the subject (Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U. S. 370, 386-389, 52 S. Ct. 183) said: 'When . . . the [Interstate Commerce] Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action . . . As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and, if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.' The same principle was followed in this state by the Superior Court; Penna. R. R. Co. v. P. S. C., 125 Pa. Superior Ct. 558, 190 A. 367; B. & O. R. R. Co. v. P. U. C., 136 Pa. Superior Ct., 517, 7 A. 2d 488."

On pages 371 and 372 of 344 Pa., the court expressly stated that the legislative process in Pennsylvania is complete when the Commission finds a new rate:

> "The company, appellant, argues that since the order of the Public Utility Commission made August 30, 1935, was appealed to the Superior Court and was modified by that court on July 10, 1936, and the tariff pursuant to that order was not effective until January

1, 1937, (application for an allocatur in the meantime having been made to and refused by the Supreme Court), the old tariff of 1931 entitled it to collect the rates fixed by it until the new tariff was effective. The Superior Court properly rejected that contention. If that theory is sound the complainants would be deprived of any right to claim reparations. It was the Public Service Commission to whom the legislature delegated the authority to determine and fix just and reasonable rates to be charged by certain utilities. In acting under that authority the commission performed a quasi legislative function and its decision, as in all rate cases, is in effect an enactment which remains the law until it is changed by the legislature acting directly or through its agent the commission. Consequently, when the commission determines an existing rate to be unjust and unreasonable that change has the same effect as any other change in the law by the legislature. The mere fact that the courts may review decisions of the commission does not affect the fact that there has been an actual change in the law insofar as it affects the particular utility. The review of orders of the commission by the courts is a judicial function whereby it is determined whether the commission has acted within its delegated powers and within the constitution.

"When the commission on August 30, 1935, determined that the rates were unjust and unreasonable that constituted a new enactment fixing the relative rights of the utility and its customers. So far as the decision of the commission was lawful it remained in force as of August 30, 1935. On that date the utility had notice that if it continued to collect for service under the old tariff it might be called upon to account by way of reparations. The mere fact that the order was subject to review did not affect that result. The situation is comparable to that which exists when the constitutionality of an act of the legislature is challenged by an appeal to the courts. If the act is sustained it remains effective as of the date originally fixed by the legislature. Just so here, the protection

> which the company enjoyed under the tariff of 1931 ceased as of August 30, 1935. The delay necessitated by appeals to the courts, often covering a long period, should not be allowed to prejudice the rights of customers of the utility unless the law demands such an interpretation, when in the end a change is sustained as was the case here."

It is clear that in the case at bar the appellant utility refused to follow a commission-made rate until after the rate had been reviewed by the appellate courts, all in total disregard of the holding of the United States Supreme Court in the *Arizona Grocery* case, *supra*, that a commission acting under this type of statutory power could— "* * * substitute a new rule of conduct as often as occasion might require, * * *."

It is apparent that the Supreme Court of Pennsylvania, by fixing August 30, 1935 as the earliest date from which appellant is liable for reparations, followed faithfully the lead of the Supreme Court of the United States.

III

The Pennsylvania Supreme Court's Interpretation of Section 313(a) of the Public Utility Law as Procedural Is Not a Violation of the Fourteenth Amendment to the Constitution of the United States and Presents No Federal Question.

The reparation complaint in this case was filed on October 17, 1935 under Article V, Section 5, of The Public Service Company Law, the Act of July 26, 1913, P. L. 1374, 66 P. S. Section 511, which reads in part as follows:

> "If, after hearing, upon complaint or upon its own motion, the commission shall determine that any rates which have been collected, or any acts which have been

done or omitted to be done, or any regulations, classifications, or practices which have been enforced for, or in relation to, any service rendered after this act becomes effective, by any public service company complained of, were in violation of any order of the commission, or were unjust and unreasonable or unjustly discriminatory, or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company on file or posted, and in effect and applicable at any time the said service was rendered,—the commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant, petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable, or unlawful collections, acts or omissions, regulations, classifications or practices, of such public service company: Provided, That such damages have been actually sustained by such complainant petitioner."

The last phase of this proceeding, which determined the individuals to whom reparations were to be awarded, was conducted after The Public Service Company Law was repealed by the Public Utility Law, the Act of May 28, 1937, P. L. 1053. The Public Utility Commission therefore applied Section 313(a) of the Public Utility Law, 66 P. S. Section 1153(a), which reads in part as follows:

"• • • Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. • • •."

The Pennsylvania Superior Court upheld the Commission and interpreted Section 313(a) of the Public Utility Law, quoted *supra*, as procedural in *Cheltenham and Abing-*

ton Sewerage Co. v. *Pa. P. U. C.*, 159 Pa. Super. 59, 46 A. 2d 583, saying at page 62:

"* * * Appellant argues that under that section [Art. V, Sec. 5, Public Service Company Act] reparations cannot be granted legally to other than a complainant, who has filed a petition within the period named therein, and that the commission erred in applying section 313 [(a)] of the Public Utility Act of May 28, 1937, P. L. 1053, 66 P. S. § 1153(a). The pertinent portion of that section reads: 'Any order of the commission awarding a refund shall be made for and on behalf of *all* patrons subject to the same rate of the public utility.' (Italics supplied). We pointed out in the former appeal (146 Pa. Superior Ct. 274, 22 A. 2d 37) that the approved practice in conducting reparation complaints is in two steps: '. . . first, hearing and determining whether the rate paid in the past was unjust or unreasonable, and, second, hearing and determining the individual claims for refund of both *complainant and noncomplainant patrons* of the utility . . . If reparations are ordered nothing which subsequently transpires before the commission will eliminate the obligation so declared, unless it happens that every patron claiming a refund either can be shown delinquent in payment of the rates charged or is met with an equivalent counterclaim due the utility.' (Italics supplied.) We previously had given expression to the same view in Manning et al. *v.* Newville Water Company, 111 Pa. Superior Ct. 229, 169 A. 254.

"The portion of section 313 to which we have referred is procedural and the commission, therefore, gave effect in the pending litigation to the prevailing law is so far as possible, as we did in the last appeal (146 Pa. Superior Ct. 283, supra) where we held it was our duty to give effect to section 1107 of the Public Utility Law, altering the scope of our review of rate cases, and that was in accordance with legislative sanction. Section 1404 of the Act of 1937, 66 P. S. § 1534, provides: 'All litigation, hearings, investigations, and other proceedings whatsoever, pending

under any act repealed by this act, shall continue and remain in full force and effect, and *may be continued and completed under the provisions of this act . . .*' (Italics supplied.) Such a retroactive application concerning procedural matters is not unconstitutional as there is no vested right in any specific type of proceeding: Lewis *v.* Penna. R. R. Co., 220 Pa. 317, 322, 69 A. 821."

The Superior Court's opinion was affirmed by the Supreme Court of Pennsylvania in a *per curiam* opinion at 355 Pa. 377, 49 A. 2d 707 (1946), and it is from this decision that the instant appeal comes.

The appellant contends that this interpretation of Section 313(a) of the Public Utility Law violates the Fourteenth Amendment to the Constitution of the United States. We submit that such contention is without merit. The Pennsylvania courts found that the method of pursuing a cause of action to judgment was procedural, and this interpretation did not affect the cause of action itself. The cause of action in the instant case is the right of appellant's patrons to reparations, and this right existed at common law. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844 (1892). Article V, Section 5, of The Pennsylvania Public Service Company Law, cited *supra,* made this cause of action statutory and provided a procedure to be followed in reparation cases. The Superior Court of Pennsylvania interpreted this statutory provision as entitling *all* patrons to reparations regardless of whether each has filed a petition. *Manning, et al.* v. *Newville Water Company,* 111 Pa. Super, 229, 169 A. 254 (1933), and reiterated this position in its opinion in the instant case. However, Section 313 (a) of the Public Utility Law, cited and quoted *supra,* replaced Article V, Section 5, of The Public Service Company Law and states in clear and unquestionable language the same procedure which had

been followed and upheld under The Public Service Company Law.

It is apparent that the Supreme Court of Pennsylvania, in affirming the Superior Court's interpretation of Section 313 (a) of the Public Utility Law as procedural, did not impose on appellant any liability greater than that which existed at common law, or than that which existed under The Public Service Company Law. It is a fundamental principle of law that the legislature can change procedure so long as procedural due process is afforded.

The appellant has been afforded every protection extended by the Constitution of the United States, and it is now attempting to alter the construction of State law as decided by the Supreme Court of Pennsylvania, through an appeal to this court. The Fourteenth Amendment cannot be availed of for this purpose. *Herbert, et al.* v. *Louisiana*, 272 U. S. 312, 47 Sup. Ct. 103 (1926).

Respectfully submitted,

CHARLES E. THOMAS,
Assistant Counsel;
SAMUEL GRAFF MILLER,
Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel for Appellee.

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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Pennsylvania Public Utility Commission and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument.

In support of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

CHARLES E. THOMAS,
Assistant Counsel;
SAMUEL GRAFF MILLER,
Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel.